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H. Allen Pennington, Jr. apennington@phblaw.com

August 5, 2004

Via FedEx Delivery

NOR 42094

Surface Transportation Board
1925 K. Street, NW
Washington, DC 20006

Re: *PCI Transportation, Inc. v. Fort Worth & Western Railroad Company*; In and Before the Surface Transportation Board

Dear Madam:

Enclosed please find an original and eleven copies of the following document submitted by Plaintiff PCI Transportation, Inc.:

- Original Complaint and Application for Injunctive Relief.

Please file the original with the records of the court and return the excess file-marked copies to the undersigned in the enclosed envelope I have provided for your convenience. Also enclosed is our firm check in the amount of $1,000.00 to cover the filing fees for said complaint.

Thank you for your assistance in this regard and should you have any questions please do not hesitate to call me.

Sincerely yours,

PENNINGTON, HILL & BAKER, LLP

By: H. Allen Pennington, Jr. by CEB
H. Allen Pennington, Jr.

FEE RECEIVED
AUG 8 2005
SURFACE TRANSPORTATION BOARD

HAP/mr
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IN AND BEFORE THE SURFACE TRANSPORTATION BOARD

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NO. _____

PCI TRANSPORTATION, INC.

Complainant,

V.

FORT WORTH & WESTERN RAILROAD COMPANY

Respondent.

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ORIGINAL COMPLAINT AND APPLICATION FOR INJUNCTIVE RELIEF

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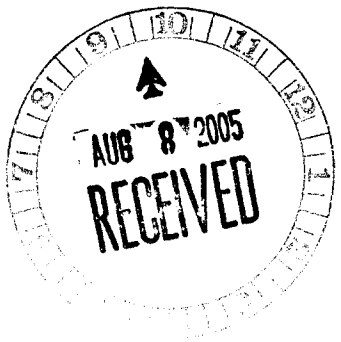
ATTORNEYS FOR PCI TRANSPORTATION, INC.



IN AND BEFORE THE
SURFACE TRANSPORTATION BOARD

PCI TRANSPORTATION, INC.,
Complainant,

v.

FORT WORTH & WESTERN RAILROAD COMPANY, INC.,
Respondent.

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COMPLAINT NO R 42094

ORIGINAL COMPLAINT AND
APPLICATION FOR INJUNCTIVE RELIEF

PCI Transportation, Inc. ("PCI" or "Complainant"), files this its Original Complaint and Application for Injunctive Relief with the Surface Transportation Board (the "Board"), complaining of Respondent Fort Worth & Western Railroad Company, Inc. ("FWWR" or "Respondent"), and would respectfully show the Board the following:

PARTIES

1. Complainant is a Texas company with an office at 3201 N. Sylvania Ave., Fort Worth, Tarrant County, Texas.

2. Respondent FWWR is a corporation organized under the laws of, and with its principal place of business in, the State of Texas. FWWR may be served with notice of this proceeding on its President, Mr. Jim M. Martin, at 6300 Ridglea Place, Suite 1200, Fort Worth, Tarrant County, Texas.

VENUE & JURISDICTION

3. The Fifth Circuit Court of Appeals has ruled on July 26, 2005 that the STB has exclusive jurisdiction of the claims in this proceeding in Action No. 04-10965 in such Court. A copy of the court's opinion is attached hereto. Specifically, the Court ruled that all

the requests herein by PCI are outside the scope of the express terms of the Confidential Demurrage Agreement between the parties, thus are outside the provisions of 49 U.S.C Sec. 10709, and therefore within the exclusive jurisdiction of the STB. The Fifth Circuit has ruled, in effect, then, that all "contractual relief" sought by PCI herein, which PCI maintains is, in fact, based upon the parties' contract, and their course of dealing thereunder, and the customs and practices in the railroad industry, is not within the express terms of the parties' express agreement and thus within the exclusive jurisdiction of the STB. The Fifth Circuit further ruled that any "non-contractual" relief sought by PCI is also within the exclusive jurisdiction of the STB. At this time, PCI does not intend to further challenge these rulings by the Fifth Circuit, but reserves the right to do so in the future.

FACTS

4. PCI is in the business of receiving and handling rail cargo in Fort Worth, Texas, and is located on a railroad spur which comes off the Union Pacific and Burlington Northern railroad lines (the "Fort Worth Main Lines") which pass through the central north side of Fort Worth, Texas. These main railroad lines constitute a public utility which serves the public. FWWR contends that it either owns or controls the railroad tracks connecting PCI's spur to the Fort Worth Main Lines.

5. In approximately the Spring of 1998, FWWR and PCI entered into an agreement whereby FWWR would take into its business premises and rail yard, which is located at the Hodge railroad yard on Long Avenue in north Fort Worth, any railroad cars from the Fort Worth Main Lines bearing cargo ordered for delivery to Fort Worth by PCI.

6. PCI rents warehouse space of approximately 320,000 square feet at its Fort Worth location. The warehouses are served by the aforementioned railroad spur off the

Union Pacific and Burlington Northern lines, which spur consists of an "A" and a "B" track. PCI's railroad spur can accommodate up to ten railroad cars for unloading into PCI's warehouse at one time when the cars are facing the correct way and are not positioned improperly on the spur tracks.

7. At the time of the original agreement between FWWR and PCI, FWWR agreed to provide PCI unlimited daily switches, that is, to provide PCI as many railroad cars as it desired from the available loaded cars located in FWWR's yard which were bound for PCI. Based upon the agreement and commitment of FWWR, PCI was able to secure a long-term lease agreement of its warehouse space and spur with the Sylvania Industrial Park.

8. The business relationship between PCI and FWWR proceeded satisfactorily for a number of years. During that time, a course of dealing developed whereby FWWR would spot, or deliver, to PCI, the oldest cars first; that is, the cars would be delivered to PCI's spur by FWWR on a first-in, first-out basis. PCI would show that this has also been the custom and practice in the railroad industry, including, but not limited to Tarrant County and the State of Texas, at all relevant times hereto.

9. In August, 2001, FWWR and PCI had a disagreement concerning a demurrage charge sought to be imposed by FWWR. Demurrage is a charge by a railroad company to a spur company, such as PCI, which is unable to take possession of a loaded railroad car within some agreed upon or legally imposed period of time after the car is received by the railroad company. On or about August 23, 2001, FWWR and PCI entered into a confidential written agreement regarding the parties' future relationship ("Agreement"). The Agreement is expressly made confidential and, therefore, PCI will

submit same to the Board for in-camera review in connection with this Injunctive Relief, and only the portions of the Agreement pertinent and necessary to this action are set forth herein. FWWR has repeatedly threatened PCI with repercussions from disclosing the terms of the Agreement, even to a court of law in connection with seeking relief under such agreement. No monies exchange hands between FWWR and PCI under the Agreement because FWWR receives its revenues for receiving the loaded railroad cars from the mainland railroads, UPR and BN. Under this new Agreement, FWWR agreed to provide PCI one switch, or spot, of loaded cars per day to PCI's spur, and to not impose a demurrage charge to PCI unless it had to hold a loaded PCI-bound car for more than four days. Since execution of this Agreement, the parties' custom and practice has been that FWWR would deliver to PCI the oldest cars first; that is, the cars that have been in its possession the longest. This has also continued to be the standard practice in the industry for obvious reasons since August 23, 2001, and has been recognized and confirmed orally and in writing by FWWR on several occasions since execution of the Agreement.

10. Recently, FWWR has varied from its first-in, first-out practice of delivery of PCI cars to the PCI spur, which has created situations where FWWR has held, against PCI's express wishes, railroad cars filled with important cargo belonging to PCI's customers for over four days. On some occasions, FWWR has then brazenly attempted to impose a demurrage charge to PCI because these cars have been in its yard for over four days. In these situations, which is certainly the case with the demurrage charge referenced hereinafter, had FWWR honored its agreement and its custom, practice and industry standard, the subject cars would not have been in the possession of FWWR for more than four days.

11. Similarly, there are so-called "service failures" which occur from time to time in the performance of FWWR's obligations under the Agreement. For example, FWWR sometimes spots cars on PCI's spur backwards or in locations where they obviously cannot be unloaded with PCI's equipment. These cars cannot be unloaded in these situations, and therefore must be removed by FWWR and brought back the next day with the next group of cars. On some occasions, FWWR has then attempted to impose a demurrage charge on the misplaced cars or on other cars which are delayed by FWWR's service failures of this type, and not by any conduct or action on the part of PCI.

12. By letter dated February 3, 2004, a true and correct copy of which is attached as Exhibit "A" and incorporated by reference, FWWR provided written notice to PCI that if an invoice for July, 2003 demurrage in the amount of $2,340.00 was not paid by February 20, 2004, then FWWR would cancel the parties' August 23, 2001 Agreement. FWWR further threatened PCI in its letter that PCI would be placed on a cash basis and that, with respect to all PCI-bound cars presently in its possession (which contain goods owned not by PCI, but by PCI's customers), PCI would be held on "constructive placement accruing demurrage until all outstanding invoices are paid." The July, 2004 invoices which FWWR is attempting to collect are based upon situations where railroad cars were in the possession of FWWR for greater than four days solely because of its failure to deliver PCI cars on a first-in, first-out basis.

13. PCI first received the attached February 3, 2004 letter by telecopy on February 26, 2004, and had no knowledge of its contents or existence prior to that date.

14. Randy Gaston, the PCI representative and officer in Fort Worth, met with FWWR representatives, Jim Martin and Steve George, on March 1, 2004, to demonstrate,

using FWWR's own records, that the cars for which the July, 2004 demurrage charges were being imposed would not have been in FWWR's possession more than four days had the PCI-bound cars been delivered to PCI on a first-in, first-out, or oldest-car, basis. At the meeting, the FWWR representatives acknowledged their mistake, and indicated that the demurrage charge would be withdrawn.

15. Then, the next day, Mr. Martin emailed PCI a new demand letter, a true and correct copy of which is attached hereto as Exhibit "B" and incorporated by reference, again demanding payment of the July, 2003 demurrage charge and stating that FWWR would place PCI in default under the Agreement if such bill was not paid by March 8, 2004. The letter acknowledges that the oldest cars were not delivered first to PCI, but states that this was done on the verbal instructions from one of PCI's yard employees. These alleged instructions never occurred but, in any event, at the March 1, 2003 meeting, Mr. Martin stated that any such oral instructions "[don't] matter unless it was in writing and my people know that." Mr. Gaston of PCI responded to this letter late on March 2, 2004, by email, a true and correct copy of which is attached hereto as Exhibit "C" and incorporated by reference, reminding Mr. George of the acknowledgments of FWWR the previous day and asking for reconsideration of the demand. No response has been received to this request.

16. In addition, within a few days, FWWR had given PCI delivery schedule for PCI-bound cars in its yard which would guarantee that some cars would necessarily be held in the FWWR lot for more than four days. These actions appear to be calculated to cause PCI to incur demurrage charges under the parties' Agreement, since a normal delivery schedule of the ten cars per day which PCI and its facility can accommodate would result in no cars being in FWWR's yard for more than four days. FWWR has also recently

taken the shocking and untenable position that demurrage charges are due regardless of whether its actions and negligence cause a delay in delivery of cars, including in those situations involving obvious service failures on the part of FWWR.

17. FWWR's foregoing actions constitute an obvious interference with PCI's contractural relations with its customers and its ability to deliver goods owned by PCI's customers on a timely basis.

18. PCI has no adequate remedy at law for FWWR's breaches of the Agreement and its threatened unlawful conduct. PCI has contracts with its customers to receive freight in Fort Worth via rail and to deliver same to its customers, and FWWR's actions are preventing PCI from honoring its contracts with its customers. FWWR's threatened immediate termination of the Agreement with PCI would deny PCI's access to the United States' public railroad system and would likely put PCI's Fort Worth operation out of business immediately. In addition, such action would prevent PCI from being able to perform its contracts with its customers. PCI's injuries and losses from FWWR's actions and threats are continuing, and such injuries worsen by the day.

CAUSES OF ACTION

Count I. Breach of Contract/Attorneys' Fees

19. The allegations of the foregoing paragraphs are incorporated herein by reference.

20. By FWWR's failure to deliver PCI cars on a first-in, first-out basis, and in attempting to impose demurrage charges when delays in delivery of cars is based upon FWWR's service failures, and then attempting to charge PCI demurrage on the cars that FWWR itself has caused to be delayed, Defendant FWWR has breached the August 23,

2001 Agreement. Upon the filing of this petition, PCI has been damaged as a result of such breach in an amount equal to the past demurrage charges which have improperly been imposed. However, if the actions of FWWR continue as outlined above, PCI will be damaged in much greater amounts which will be proved at trial after appropriate discovery in this cause. Defendant FWWR has threatened to terminate the Agreement without providing Plaintiff notice of any plausible breach caused by Plaintiff.

21. PCI is also entitled to recovery of its attorneys' fees reasonably incurred in prosecuting these claims, in an amount and measure as shown at trial. Plaintiff has presented the contract claim and disputes contained herein to FWWR, and Defendant has refused to refund, write off or credit certain demurrage charges and has refused to act in accordance with the express terms of the Agreement.

Count II.
Intentional Interference with Existing and Prospective Contractual Relations

22. The allegations of the foregoing paragraphs are incorporated herein by reference.

23. Plaintiff PCI would show that Defendant FWWR, through its agents' and representatives' acts as set forth in the factual background above, have intentionally and wrongfully interfered with the contractual relations between Plaintiff and its customers. Specifically, Defendant has failed to provide PCI-bound railroad cars to PCI within the required time, which has resulted in delays in delivery of items to PCI's customers.

24. By engaging in the conduct outlined above, FWWR has intentionally deprived and interfered with PCI's business relationships, and its actual and prospective contractual relationships with all of PCI's customers for which it receives goods.

25. Based upon the foregoing facts, PCI would show that FWWR and its agents and representatives have tortiously and wrongfully interfered with existing and prospective contractual relations between PCI and its actual and prospective customers, for which PCI is entitled to its actual damages as proved at trial.

Count III.
Application for Injunctive Relief

26. The allegations of the foregoing paragraphs are incorporated herein by reference.

27. It is clear that (a) PCI has a substantial likelihood of success on the merits of its case; (b) there is a substantial threat of irreparable injury to PCI if the injunction is not issued; (c) that the threatened injury to PCI outweighs any damage the preliminary injunction might cause to Respondant; and (d) that the preliminary injunction will not disserve the public interest in any way. Therefore, in order to preserve the status quo of PCI's contractual rights during the pendency of this matter, it is essential that the Board immediately and temporarily restrain FWWR from the foregoing conduct, because of the imminent harm facing PCI as described above. Therefore, PCI requests that the Board immediately restrain FWWR, its officers, agents and employees, from the following acts:

a. providing purported notice of cancellation of any agreements between PCI and FWWR and contending that any such agreements have been terminated;

b. refusing to deliver a full spot of PCI-bound railroad cars with cargo per day to PCI on its spur, to the extent such cars are available;

c. delivering cars to PCI's spur on any basis other than on the basis of delivery of those PCI-bound cars which have been in FWWR's possession the most number of days;

d. imposing or attempting to impose any demurrage charges upon PCI when timely delivery of PCI's cars on a first-in, first-out basis would have resulted in no demurrage charges, and in those situations where no demurrage charges would accrue but for FWWR's service failures;

e. imposing or attempting to impose any demurrage charges upon PCI where the subject railroad car has been in FWWR's yard less than four days;

f. refusing to deliver cars on the basis of alleged unpaid demurrage charges, which are based upon:

    a. any cars held by FWWR in its yard for less than four days;

    b. any cars held by FWWR in its yard for more than four days, but having been in such yard for more than four days as a result of a) FWWR delivering less than a full spot of cars to PCI in the relevant preceding days; b) FWWR's service failures; or c) a combination of (a) and (b); and

g. reporting to any credit reporting agency or any of PCI's creditors, brokers, or customers any alleged unpaid demurrage charges arising out of PCI's Fort Worth, Texas operation.

PCI further requests that the Board, after hearing the evidence, enter a preliminary injunction on the foregoing bases, or on such bases as modified by the Board, based upon

the evidence presented and the Board's discretion as to the fashioning of the appropriate injunctive relief between the parties.

28. In order to preserve the status quo of Plaintiff's contractual rights during the pendency of this matter, FWWR should be cited to appear and show cause why it should not be restrained, during the pendency of this action, from the conduct described in the foregoing Application for Injunctive Relief.

APPLICATION FOR PERMANENT INJUNCTION

29. The allegations of the foregoing paragraphs are incorporated herein by reference.

30. For the reasons stated in this pleading, PCI requests that, after hearing, the Board grant a permanent injunction enjoining FWWR from all the foregoing activities. PCI requests that the Board enjoin FWWR from these activities for a period of ten (10) years from the date of filing of this Complaint or such other period found appropriate by the Board.

Count IV.
Violations of Chapter 17 of the Texas Business and Commerce Code (DTPA)

31. By way of further complaint, as stated above, on or about August 23, 2001, FWWR and PCI entered into the written Agreement regarding the switching of railroad cars at PCI's business location in north Fort Worth, Texas. Under this Agreement, FWWR agreed to provide PCI one switch, or spot, of loaded cars per day to PCI's spur, and agreed not to impose demurrage charges upon PCI unless FWWR had to hold a loaded PCI-bound car for more than four business days. In reliance upon this Agreement, and FWWR's express undertakings therein, PCI entered into a renewal contract for a long-term

lease of its warehouse space and spur at the Sylvania Industrial Park. Prior to execution of the Agreement, FWWR had honored certain long-standing customs and practices of the railroad industry in the State of Texas in its several year relationship with PCI. PCI was not advised in connection with execution of the Agreement that FWWR did not intend to continue to honor these customs and practices in the Texas railroad industry in connection with the parties' performance under the written Agreement.

32. Further, there was nothing stated in the Agreement advising of any intent on the part of FWWR not to follow these long-standing customs and practices. Thus, PCI reasonably assumed that FWWR would continue to honor these customs and practices and relied upon such fact. Though deviating from theses recognized customs and practices prior to August, 2003, FWWR always recognized its obligations to follow the above customs and practices as part of their working relationship with PCI.

33. Since execution of the Agreement, but most notably since August, 2003, FWWR has failed on many occasions to follow these long-standing customs and practices in the railroad industry in the State of Texas regarding the delivery of cars. In August of 2003, FWWR sent an improper bill to PCI which was proven by PCI to be erroneous in light of the Agreement and the above recognized customs and practices. Several months passed and the matter seemed to be resolved until PCI received formal demand from FWWR in February 3, 2004, for the August, 2003 bill. February 3, 2004 was the first time PCI was formally notified of FWWR's intent to deviate from the Agreement and its previously recognized customs and practices. FWWR's improper billing charges were the result of conducting business with PCI contrary to FWWR's representations and its failure to abide by the terms and conditions expressly made to PCI. By way of example, but not

by limitation, FWWR has failed to follow these long-standing customs and practices in the railroad industry in the State of Texas regarding the delivery of cars in the following manner:

a. failure to provide cars on a first-in, first-out basis;

b. failure to provide a full spot of cars each day;

c. failure to recognize service failures on the part of FWWR in the calculation of demurrage, including events and conditions not caused by PCI;

d. imposing or attempting to impose demurrage charges which are the result of one or more of the foregoing events; and

e. imposing or attempting to impose demurrage charges in future days and on other cars based upon one or more of the above events occurring in prior days, where demurrage would not be due but for one or more of the foregoing events happening in prior days.

34. In addition, there was clearly a failure on the part of FWWR to disclose other numerous facts regarding how it intended to perform its services under the Agreement. Specifically, FWWR failed to disclose to PCI, prior to execution of the Agreement, that it would:

a. not follow each of the above standards and practices in the railroad industry in the State of Texas;

b. attempt to cancel the Agreement based upon any dispute regarding a demurrage bill, regardless of the legitimacy of such dispute or the good faith in which such bill was disputed;

c. attempt to cancel the Agreement whenever PCI sought to enforce the express terms of the Agreement in a court of law;

d. attempt to cancel the Agreement when any negative comments were made concerning the validity of any of FWWR's demurrage bills or regarding FWWR's demurrage billing system as a whole; and

e. use a faulty and unreliable computer system to generate demurrage bills, which system can neither make basic arithmetical calculations nor take into account the fact that demurrage is not due because of failures (a) to deliver cars on a first-in first-out basis, (b) to deliver a full spot of cars each day from available cars; (c) to deliver cars in prior days based on service failures; or (d) to deliver cars in prior days based upon other events and circumstances not the fault of PCI.

35. PCI would not have entered into the Agreement, nor would it have entered into a renewal of its long-term lease with the Sylvania Industrial Park, had the foregoing facts been disclosed.

36. The relevant provisions of the August 23, 2001 Agreement, which is the subject of this complaint, required FWWR to provide PCI with at least one "switch" per day to PCI's spur. The Agreement provides for four free days for which demurrage are not charged; this is two more days than is granted under the tariff alleged to be applicable by FWWR. These provisions are not at issue between the parties. The Agreement is, however, silent as to any definition of the term "switch" supplied by FWWR in the Agreement, or as to any criteria to determine if a "switch" is properly performed. PCI alleges that this term is defined by the consistently recognized custom and practice of

FWWR. The custom and practices between the parties alleged by PCI were confirmed by Charles Godsey, the operations manager for FWWR in his deposition testimony taken May 26, 2004. Mr. Godsey testified that it has always been the practice of FWWR with all its customers, including PCI, not to charge demurrage under the following circumstances:

a. where FWWR has not spotted the oldest cars first, absent instructions from the customer to the contrary;

b. where FWWR fails to provide a daily switch of cars;

c. where FWWR fails to deliver a full spot of cars;

d. in the event of certain service failures, including:

(i) when FWWR turns a box car on the customer's spur the wrong way (resulting in an inability of the customer to unload the car);

(ii) when FWWR delivers cars to the customer's spur in a manner which results in an inability to unload the cars for other reasons;

(iii) derailment;

(iv) engine breakdown; and

(v) flood, fire or rain;

e. when a customer's cars get "stuck" behind other customer's cars on an interchange, resulting in cars not being delivered to the customer on an oldest car basis; and

f. when any of the above issues causes a "domino effect" on

future days, FWWR doesn't charge demurrage on those affected cars.

FWWR representative, Mr. Godsey's deposition clearly illustrates what FWWR meant in the term daily "switch" in the parties' Agreement.

Further, FWWR contends that it is entitled to (attempt to) cancel the subject Agreement because of PCI's refusal to pay the June, 2003, demurrage charges. PCI, however, can, demonstrate that this demurrage bill was completely false and shows the details of how FWWR was aware of the spurious nature of the bill. This evidence, along with the deposition testimony of FWWR's representative Charlie Goodsey, who admits that FWWR's computer software is known by FWWR to produce inaccurate demurrage bills, eviscerates the validity of this excuse by FWWR for allegedly canceling the Agreement.

37. PCI is a consumer, as defined by the DTPA. The above actions and misrepresentations of FWWR are in violation of provisions of the DTPA, have been a producing and proximate cause of damages to PCI for which is seeks recovery. The actions by FWWR violate the following provisions of the DTPA:

a. representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have;

b. representing that goods or services are of a particular standard, quality or grade, if they are of another;

c. representing that an agreement confers or involves rights, remedies or obligations which it does not have or involve;

d. generally engaging in false, misleading and deceptive practices in the

dealings with our client;

e. engaging in an unconscionable action or course of action in the dealings with our client; and

f. failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.

38. PCI has suffered actual damages within the jurisdictional limits of this court as a result of the foregoing conduct of FWWR. For example, but not by way of limitation, PCI has incurred actual damages in the form of wages and benefits paid to workers who reported to work at PCI to unload available cars, but which were not spotted on PCI's spur pursuant to the above recognized customs and practices. PCI seeks recovery of the following relief from FWWR, based upon Plaintiff's foregoing cause of action under the DTPA:

a. All actual economic damages as proved at trial;

b. Reasonable attorneys' fees in an amount proved at trial;

c. Pre-judgment and post-judgment interest at the legal rates allowed by Texas law as to any economic damages awarded;

d. All reasonable and necessary expenses incurred by Plaintiff in pursuing the causes of action herein; and

e. Costs of court.

Count V.
Declaratory Judgment

39. An actual controversy has arisen and now exists between PCI and FWWR relating to the express Agreement between the parties, PCI would show that it is entitled to declaratory judgment finding against FWWR, namely findings as follows:

a. that the Confidential Demurrage Agreement was not terminable at will and/or upon notice;

b. that a March 2, 2004, letter from FWWR was not reasonable, proper or effective notice of cancellation of the parties' Confidential Demurrage Agreement;

c. that an April 20, 2004, letter from FWWR's counsel was not proper or effective in giving notice of any cancellation or effective date of cancellation or termination of the parties' Confidential Demurrage Agreement; and

d. that FWWR is not entitled to charge or collect demurrage from PCI pursuant to Tariff FWWR 8001-G.

ORAL HEARING

40. PCI requests and makes demand for oral hearing on all issues.

PRAYER

WHEREFORE, PREMISES CONSIDERED, PCI respectfully requests that Respondent FWWR be cited to appear and answer herein, and that upon hearing, PCI have and recover judgment against FWWR for all actual and consequential damages arising from the actions described herein, pre- and post-judgment interest as allowed by Texas law, costs of court, and such other and further relief, both general and special, at law and in equity, to which PCI may show itself justly entitled. PCI also seeks a temporary injunction and permanent injunction requiring respondent FWWR to act in accordance with the terms of the Agreement and refrain from the acts described above. PCI also seeks the

recovery of all actual, consequential and treble damages as provided under Chapter 17 of the Texas Business and Commerce Code. PCI further prays that it be granted the foregoing declaratory relief and such other and further legal and equitable relief to which it shows itself justly entitled.

PENNINGTON, HILL & BAKER, LLP

By: _____

H. Allen Pennington, Jr. – Lead Counsel
Texas State Bar No. 15758500
Matthew Germany
Texas State Bar No. 24025377

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Fort Worth, Texas 76102
Telephone: (817) 332-5055
Facsimile: (817) 332-5054

ATTORNEYS FOR
PCI TRANSPORTATION, INC.

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF TARRANT §

Before me, the undersigned notary public, on this day personally appeared Randy Gaston, Vice President of PCI Transportation, Inc., known to me to be the person whose name is subscribed to the foregoing instrument and, being by me first duly sworn, and on oath deposed that he has read the foregoing Original Complaint and Request for Temporary Restraining Order, and the facts contained therein upon which are based the requests for injunctive releif are within his personal knowledge and are true and correct.

Randy Gaston

Subscribed and sworn to before me on this the 5th day of August, 2005.

Sarah V. Whitney
Notary Public - State of Texas
My commission expires 11-13-2008

United States Court of Appeals
Fifth Circuit
FILED
July 26, 2005
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 04-10965

PCI TRANSPORTATION INC,

Plaintiff-Appellant

versus

FORT WORTH & WESTERN RAILROAD COMPANY,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Texas

Before HIGGINBOTHAM, WIENER and CLEMENT, Circuit Judges.

WIENER, Circuit Judge:

Appellant PCI Transportation, Inc. ("PCI") appeals the district court's orders denying (1) remand, and (2) a preliminary injunction. We affirm.

I. FACTS AND PROCEEDINGS

PCI receives and distributes rail cargo in Fort Worth, Texas, via a distribution warehouse serviced by a spur that comes off of railroad lines of the Union Pacific Railroad ("Union Pacific") and the Burlington Santa Fe Railroad ("BNSF"). Appellee Fort Worth & Western Railroad Co. ("FWWR") is a short-line railroad that

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operates passenger and freight trains within Texas. FWWR operates a switching yard that, via PCI's spur, links its warehouse to the Union Pacific and BNSF railroads. Under various agreements, Union Pacific and BNSF deliver railcars to FWWR's switching yard, after which FWWR switches and delivers these cars to customers of Union Pacific and BNSF, such as PCI, for unloading. After the railcars are unloaded, FWWR returns the empty cars to the main railroads' lines. BNSF and Union Pacific compensate FWWR for its switching services, but the railroads also charge FWWR for the time that it retains the railcars at its switching yard. In turn, FWWR collects demurrage[1] fees from end-use customers such as PCI.

In August 2001, after a dispute had arisen concerning demurrage charges imposed on PCI by FWWR, these parties entered into a contract (the "contract") aimed at avoiding further conflict, a goal that the contract has obviously failed to attain. The entire contract is a one page letter, and is self-styled with two different names — "Confidential Demurrage Contractual Agreement" and "Confidential Contractual Agreement for Free Time." The language of the contract provides that (1) PCI will have four demurrage-free days, and (2) FWWR is committed to providing PCI with a minimum of one "switch" daily, seven days per week. The contract also establishes the demurrage rate applicable after free

[1] Demurrage is a charge assessed for detaining a freight car, truck, or other vehicle beyond any free time stipulated for loading or unloading.

01 024

time expires. (The contract was never placed in evidence before the district court, but following oral argument on appeal, it was submitted to us under seal.) PCI alleges that, since the execution of the contract and in conformity with common industry practice, FWWR has delivered cars to PCI on a first-in, first-out ("FIFO") basis.

In February 2004, more than two years after execution of the contract, a new dispute arose between PCI and FWWR concerning demurrage charges for the month of June 2003. PCI contends that FWWR had engaged in several practices that resulted in improper demurrage fees being charged to PCI, to wit: (1) FWWR varied from its practice of delivering cars to PCI on a FIFO basis, with the result that FWWR held cars intended for PCI's customers for longer than four days; (2) at times, FWWR had delivered rail cars on PCI's spur backwards, making it impossible for PCI to unload those cars and requiring FWWR to move the cars out, reverse them, then bring them back in again with the next group of cars; (3) FWWR provided PCI with a delivery schedule the effect of which virtually guaranteed that some of the cars would be held in the FWWR yard for more than four days, thereby unnecessarily incurring demurrage costs.

PCI filed suit in state court alleging that FWWR had breached the contract. PCI also claimed intentional interference with contractual relations and requested a TRO, a "temporary injunction," and a permanent injunction restraining FWWR for a

01 025

period of ten years from (1) "providing purported notice of cancellation of any agreements between PCI and FWWR"; (2) "refusing to deliver less than ten (10) PCI-bound railroad cars with cargo per day to PCI on its spur, to the extent such cars are available"; (3) "delivering cars to PCI's spur on any basis other than on the basis of delivery of those PCI-bound cars which have been in FWWR's possession the most number of days"; and (4) "imposing or attempting to impose any demurrage charges upon PCI, or in the alternative, imposing or attempting to impose any demurrage charges upon PCI when timely delivery of PCI's cars on a first-in, first-out basis would have resulted in no demurrage charges, and in those situations where no demurrage charges would accrue but for FWWR's service failures". The state court granted PCI's request for a TRO.

FWWR then removed the case to federal court, asserting that PCI's state law claims were completely preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA").[2] The ICCTA overhauled the Interstate Commerce Act ("ICA"), including the elimination of the Interstate Commerce Commission and replacing it with the Surface Transportation Board ("STB"). PCI filed a motion for remand, arguing that the suit was outside the ambit of the ICCTA. The district court denied PCI's motion, concluding that removal was proper under the doctrine of complete preemption.

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[2] 49 U.S.C. §§ 10101, et. seq.

01 026

PCI filed a request for a temporary injunction and hearing in the district court, seeking essentially the same relief that it had sought in state court. This was PCI's second motion for injunctive relief. Its first motion was denied for procedural reasons. The district court denied PCI's motion without a hearing, holding that, as a result of PCI's failure to proffer into evidence the contract on which it based its claims for relief, it had not demonstrated, prima facie, that the district court, as distinguished from the STB, had jurisdiction to entertain PCI's requested injunctive relief. The district court also held that PCI failed to demonstrate that it would suffer irreparable injury absent an injunction. PCI appeals the district court's denial of its remand motion, denial of its motion for a preliminary injunction, and refusal to hold a hearing on the motion for a preliminary injunction.

II. ANALYSIS

A. Appeal of the Remand Order

An order denying a motion to remand is not appealable as a final decision within the meaning of 28 U.S.C. § 1291; standing alone, such a ruling cannot be appealed unless certified by the district court under 28 U.S.C. § 1292(b).[3] PCI nevertheless contends that we have jurisdiction to consider its appeal of the

[3] Poirrier v. Nicklos Drilling Co., 648 F.2d 1063, 1064-65 (5th Cir. 1981); Lewis v. E.I. Du Pont De Nemours & Co., 183 F.2d 29, 31 (5th Cir. 1950).

01 027

remand order, citing the Ninth Circuit's decision in O'Halloran v. University of Washington.[4] The court in O'Halloran held that an appeal from an order denying a motion to remand is reviewable prior to final judgment when joined with an interlocutory appeal from an order granting or denying an injunction.[5]

Several other circuits have held the same, either expressly or implicitly.[6] We have not previously addressed the question whether the denial of a remand order becomes reviewable when it is coupled with an interlocutory appeal of an injunction order under 28 U.S.C. 1292(a)(1). We did conclude in Texas v. Real Parties in Interest, however, that the denial of a remand order can be reviewed in conjunction with the interlocutory appeal of an order denying a claim of Eleventh Amendment immunity, the latter order being appealable under the collateral order doctrine.[7] In deciding that

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[4] 856 F.2d 1375 (9th Cir. 1988).

[5] Id. at 1378.

[6] See James v. Bellotti, 733 F.2d 989, 992 (1st Cir. 1984) ("The denial of an injunction is an appealable interlocutory order under 28 U.S.C. § 1292(a)(1), and the refusal to remand to the state court, though not directly appealable by itself, is reviewable in conjunction with the interlocutory appeal."); Beech-Nut, Inc. v. Warner-Lambert Co., 480 F.2d 801, 803 (2d Cir. 1973) (considering interlocutory appeal of denial of remand order along with denial of injunctive relief without discussion of why consideration of remand was proper); Kysor Indus. Corp. v. Pet, Inc., 459 F.2d 1010, 1011 (6th Cir. 1972) (holding that because the case was properly before the court on interlocutory appeal of the denial of a motion for a preliminary injunction, and the remand issue was jurisdictional, the remand issue must be reached).

[7] 259 F.3d 387, 391 (5th Cir. 2001).

01 028

we could consider the order denying remand, we looked solely to whether the Eleventh Amendment immunity issue was non-frivolous and properly before us on appeal.[8] Implicit in that decision is the conclusion that, once appellate jurisdiction has been established, we are compelled to address questions of federal jurisdiction.

In the context of the collateral order doctrine, we perceive no difference in the distinction between Eleventh Amendment immunity and remand. We thus conclude that PCI's appeal of the denial of its motion for a preliminary injunction is both non-frivolous and properly before us. Consonant with our holding in Real Parties in Interest, we first consider the jurisdictional question whether the district court erred in denying PCI's motion to remand the case to state court.

B. Removal and Remand

The district court denied PCI's motion to remand the case, relying primarily on (1) the Northern District of Iowa's reasoning in Cedarapids, Inc. v. Chicago, Central & Pacific Railroad Co.[9] and (2) § 10501 of the ICCTA. Section 10501 provides:

> (b) The jurisdiction of the Board over--
>
> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

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[8] Id.

[9] 265 F. Supp.2d 1005 (N.D. Iowa 2003).

01 029

> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.[10]

PCI contends that removal was improper because the relief that PCI requests is expressly excluded from the reach of the ICCTA by § 10709 of that act. "We exercise plenary, de novo review of a district court's assumption of subject matter jurisdiction."[11]

1. PCI's § 10709 Argument

FWWR establishes rates for its transportation services, as well as rules and practices related to those services, including specifically the rules relating to the imposition of demurrage fees.[12] The injunctive relief PCI seeks would regulate the operation of FWWR's switching yard and would therefore fall squarely under § 10501(b). PCI argues nonetheless that its dispute with FWWR is purely over FWWR's compliance with the contract, and that, under 49 U.S.C. § 10709, such contracts are not subject to

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[10] 49 U.S.C. § 10501.

[11] Hoskins v. Bekins Van Lines, 343 F.3d 769, 772 (5th Cir. 2003).

[12] 49 U.S.C. § 10701.

01 030

the ICCTA and thus not under the jurisdiction of the STB. Section 10709 provides in relevant part:

> (a) One or more rail carriers providing transportation subject to the jurisdiction of the Board under this part may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions.
>
> (b) A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.
>
> (c)(1) A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part.
>
> (2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree.

None disputes that FWWR is a rail carrier and PCI is a purchaser of its services.[13]

PCI's position on the applicability of § 10709 can be distilled to two arguments. First, PCI argues that the STB has no jurisdiction to hear claims even related to agreements governed by § 10709, citing the language of the statute and decisions of the

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[13] "'[R]ail carrier' means a person providing common carrier railroad transportation for compensation," 49 U.S.C. § 10102(5), and a "railroad" includes a "switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation." § 10102(6)(C).

01 031

STB refusing to consider such disputes.[14] We see nothing in the statutory language that supports PCI's "related to" argument, however, and PCI fails to direct us to any such language. In fact, § 10709(b) specifies that a party entering into such a contract has only "those duties specified by the terms of the contract." The decisions of the STB cited by PCI also fail to support its argument. H.B. Fuller Co. v. Southern Pacific Transportation Co.[15] is inapposite because the contract at issue there was a comprehensive one that purported to govern the entire relationship between the litigants. Fuller, a manufacturer, sued Southern Pacific, alleging that the railroad had imposed unreasonable storage and demurrage charges. The transportation in question was subject to a "contract for carriage." Fuller argued that its claims fell outside that contract and thus within the STB's jurisdiction, because the contract did not explicitly address demurrage or storage charges. The STB rejected Fuller's argument and held that the claims fell outside its jurisdiction. Although the contract did not explicitly address those areas, it did incorporate by reference the "tariffs, rules and regulations which would apply" if there was no contract to govern those areas not covered by the contract. Therefore, held the STB, the referenced

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[14] Reply Brief at 6. PCI did discuss the STB cases in its initial brief, but appears to have asserted the "even related to" argument for the first time on reply.

[15] STB Docket No. 41510 (Aug. 20, 1997).

01 032

tariff terms became part of the contract. The other two STB decisions that PCI cites add nothing to the analysis.[16]

In Cross Oil Refining & Marketing, Inc. v. Union Pacific Railroad Co,[17] a decision not cited by PCI, the STB considered whether a series of purported contracts were the kind governed by § 10709. Cross Oil argued that § 10709 did not apply because, under the agreements in question, service and equipment were to be provided on the same basis as those provided to other shippers. The STB rejected Cross Oil's argument, ruling that the transportation at issue was provided under the contracts: Each contract affirmatively stated that it was made pursuant to § 10709, identified the origins and destinations, and specified the terms of the contract and the rates for the commodities. As in Fuller, the STB held that rail contracts can incorporate tariff provisions by reference yet still fall outside the STB's jurisdiction.

Unlike the agreements at issue in the cited cases, the contract in the instant case is very limited in scope, and does not incorporate any tariff provisions. As such, any relief requested

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[16] Minnesota Power Inc. v. Duluth, Missabe and Iron Range Railway Co., STB Docket No. 42038 (July 7, 1999), merely states that movement governed by a rail transportation contract is "beyond our regulatory purview under 49 U.S.C. 10709(c)" without providing any further analysis. Parrish & Heimbecker, Inc., STB Docket No. 42031 (May 22, 2000), discusses the Staggers Act, stating only that the statute removed contract service from the authority of the ICC (predecessor to the STB).

[17] STB Finance Docket No. 33582 (Oct. 19, 1998).

01 033

by PCI that falls outside of the contract's express coverage is not governed by § 10709.

The second argument made by PCI is that all relief requested is within the contract's coverage and therefore within the reach of § 10709. In its reply to FWWR's response to PCI's motion to remand, PCI contended in district court that even if the contract does not specifically address (1) whether FWWR was required to place cars at PCI's spur on a FIFO basis, or (2) whether FWWR is required to place a "full spot" of ten cars at PCI's spur each day, the consistent conduct of the parties under the contract constitutes their agreed interpretation, causing those requirements to be incorporated into the contract. On appeal, PCI no longer asserts that the parties' prior conduct interpreted or supplemented the contract, arguing instead that all requested relief is within the language of the contract, namely that the parties' prior conduct, as well as the Texas railroad industry's customs and practices, inform what the term "switch" means. PCI relies primarily on the deposition testimony of Charley Godsey, the operations manager for FWWR, to establish that the term "switch" encompasses the portion of injunctive relief that FWWR insists falls outside of the contract. FWWR counters that the "switch" language in the contract was solely meant to change the number of days per week that switching services would be provided to PCI, but does not provide an alternative definition of "switch."

01 034

Under Texas law, the primary concern of a court construing a contract is to "ascertain the true intent of the parties as expressed in the instrument."[18] Even when there is neither patent nor latent ambiguity in the wording of a contract, "[e]xtrinsic evidence may, indeed, be admissible to give the words of a contract a meaning consistent with that to which they are reasonably susceptible."[19] "A specialized industry term may require extrinsic evidence of the commonly understood meaning of that term within the specialized industry."[20] PCI provides a string of citations to the Godsey deposition to support its definition of "switch". A review of the cited portions of the record reveals, however, that Godsey was never asked to explain or define the meaning of providing a "switch." His deposition lays out how FWWR deals with customers and states that FWWR (1) does not impose demurrage charges when the mistakes are its own, (2) uses a FIFO method to determine which cars to deliver, and (3) will fill the spot available on a customer's spur each day. None of this, however, is ever tied by the deposition to the meaning of providing a "switch."

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[18] Dell Computer Corp. v. Rodriquez, 390 F.3d 377, 388 (5th Cir. 2004); Mescalero Energy, Inc. v. Underwriters Indem. General Agency, Inc., 56 S.W.3d 313, 319 (Tex. App. - Houston [1st Dist.] 2001, pet. denied).

[19] Nat'l Union Fire Ins. Co. v. CBI Indus. Inc., 907 S.W.2d 517, 521 (Tex. 1995).

[20] Royal Maccabees Life Ins. Co. v. James, 146 S.W.3d 340, 345-46 (Tex. App. - Dallas 2004, pet. filed).

Even if we were to accept PCI's broad definition of "switch," the injunctive relief it seeks is still broader than that which the contract governed. The last portion of PCI's request seeks to control FWWR's ability to impose demurrage charges under any circumstances, or in the alternative, any circumstance in which no demurrage charges would accrue but for FWWR's service failures, not just those situations in which FWWR fails either to provide a full spot of cars or to deliver the cars on a FIFO basis. We hold that, at the very least, a portion of FWWR's claims are governed by the ICCTA.

2. Complete Preemption

For the district court to have removal jurisdiction, 28 U.S.C. § 1441 requires that "the case be one over 'which the district courts of the United States have original jurisdiction.'"[21] Whether a claim arises under federal law is a question determined by reference to the plaintiff's "well-pleaded complaint."[22] As a defendant may remove a case only if the claims could have been brought in federal court, "the question for removal jurisdiction must also be determined by reference to the 'well-pleaded complaint.'"[23] "Under the well-pleaded complaint rule, 'federal

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[21] Johnson v. Baylor Univ., 214 F.3d 630, 632 (5th Cir. 2000) (citation omitted).

[22] Hoskins, 343 F.3d at 772 (citing Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152 (1908).

[23] Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 808 (1986).

01 036

jurisdiction exists only when a federal question is presented on the face of plaintiff's properly pleaded complaint.'"[24] "As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim."[25] Potential defenses, including a federal statute's preemptive effect, do not provide a basis for removal.[26]

In Beneficial National Bank v. Anderson, the Supreme Court recognized two exceptions to this last rule: (1) when Congress expressly provides for removal and (2) when a federal statute wholly displaces the state-law cause of action through complete preemption.[27] The latter exception is the one that is at issue in the instant case. As stated above, standard preemption does not provide a basis for removal. In contrast, complete preemption is jurisdictional in nature and, as such, "authorizes removal to federal court even if the complaint is artfully pleaded to include solely state law claims for relief or if the federal issue is initially raised solely as a defense."[28]

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[24] Hoskins, 343 F.3d at 772 (quoting Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987).

[25] Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 6 (2003).

[26] Id. (citing Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal., 463 U.S. 1 (1983))(emphasis added).

[27] Id. at 8.

[28] Johnson, 214 F.3d at 632 (citation omitted).

01 037

Prior to the decision in Beneficial, we considered complete preemption to be a narrow exception, noting that the Supreme Court had only recognized its existence in the areas of federal labor relations and the Employee Retirement Security Act of 1974 ("ERISA").[29] Our pre-Beneficial test for complete preemption required the defendant to show that

> (1) the statute contains a civil enforcement provision that creates a cause of action that both replaces and protects the analogous area of state law; (2) there is a specific jurisdictional grant to the federal courts for enforcement of the right; and (3) there is a clear Congressional intent that claims brought under the federal law be removable.[30]

In Hoskins, however, we modified the test in response to the Supreme Court's Beneficial decision, in which the Court extended the doctrine of complete preemption to the National Bank Act. It reasoned that because the National Bank Act provides the exclusive cause of action for claims of usury against a national bank, all such claims arise under federal law for purposes of federal jurisdiction.[31] In light of the decision in Beneficial, we held in Hoskins that the proper focus of complete preemption analysis is on

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[29] Id. (citing to Avco Corp. v. Machinists, 390 U.S. 557 (1968) and Metro. Life Ins. Co. v. Taylor, 481 U.S. 58 (1987)).

[30] Id. The district court, in concluding there was complete preemption, neither applied our circuit's test nor looked to the Supreme Court's decision in Beneficial.

[31] Beneficial Nat'l Bank, 539 U.S. at 11.

01 038

whether Congress intended that the federal action be exclusive, as opposed to whether Congress intended that the claim be removable.[32]

In Hoskins, we considered whether there is complete preemption of claims asserted under the Carmack Amendment to the Interstate Commerce Act.[33] As there is neither language in the statute expressing Congress's intent that the Carmack Amendment provide the exclusive cause of action for claims arising out of the interstate transportation of goods by a common carrier nor any legislative history to be examined, we looked to our own cases and those of the Supreme Court to determine whether Congress did indeed intend for the Carmack Amendment to provide the exclusive cause of action, holding that it did.[34] In the instant case, the plain language of § 10501 supports our conclusion that Congress intended actions regarding "rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers"[35] to be governed exclusively by the ICCTA. The House Report on the proposed ICCTA

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[32] Hoskins, 343 F.3d at 776. Our holding in Hoskins, reversing our prior holding that the Carmack Amendment did not support complete preemption, reflects Justice Scalia's conclusion that the majority's holding in Beneficial makes finding complete preemption easier than existed under Taylor. Beneficial Nat'l Bank, 539 U.S. at 16-19 (Scalia, J., dissenting).

[33] 49 U.S.C. § 14706. Section 14706 resides under the part of the ICA governing Motor Carriers. The Carmack Amendment also modified the Rail part of the ICA. 49 U.S.C. § 11706.

[34] Hoskins, 343 F.3d at 776.

[35] 49 U.S.C. § 10501(b)(1).

01 039

also supports the conclusion that the ICCTA provides the exclusive cause of action:

> [Section 10501] replaces the railroad portion of former Section 10501. Conforming changes are made to reflect the direct and complete pre-emption of State economic regulation of railroads. The changes include extending exclusive Federal jurisdiction to matters relating to spur, industrial, team, switching or side tracks formerly reserved for State jurisdiction under former section 10907. The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system. Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive.[36]

In light of the plain language of the statute and its legislative history, and in accordance with our holding in Hoskins, we hold that the complete preemption doctrine applies. And, as the ICCTA provides the exclusive cause of action for PCI's non-contractual relief, we hold that those claims "'only arise[] under federal law and could, therefore, be removed under § 1441.'"[37] The district court's denial of remand was thus appropriate.

C. PCI's Preliminary Injunction Request

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[36] H.R. REP. NO. 104-311, at 95-96 (1995). The Conference Report emphasized that the conference version of the bill was meant to preserve the exclusivity of federal remedies in the area of rail regulation that existed prior to the passage of the ICCTA. H.R. CONF. REP. NO. 104-422, at 167.

[37] Hoskins, 343 F.3d at 778 (quoting Beneficial, 539 U.S. at 11).

01 040

We review the denial of a preliminary injunction for abuse of discretion.[38] "Even though 'the ultimate decision whether to grant or deny a preliminary injunction is reviewed only for abuse of discretion, a decision grounded in erroneous legal principles is reviewed de novo.'"[39]

To obtain a preliminary injunction, the applicant must show (1) a substantial likelihood that he will prevail on the merits, (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, (3) that his threatened injury outweighs the threatened harm to the party whom he seeks to enjoin, and (4) that granting the preliminary injunction will not disserve the public interest.[40] "We have cautioned repeatedly that a preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has 'clearly carried the burden of persuasion' on all four requirements."[41]

PCI fails to establish that there is a substantial likelihood that it will prevail on the merits. As the district court noted in its denial of the injunction, PCI never submitted the contract to the court for it to review. Without the contract, the district

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[38] Lake Charles Diesel, Inc. v. General Motors Corp., 328 F.3d 192, 195 (5th Cir. 2003).

[39] Id. (quoting Women's Med. Ctr. v. Bell, 248 F.3d 411, 419 (5th Cir. 2001)).

[40] Id. at 195-96.

[41] Id. at 196 (quoting Miss. Power & Light Co. v. United Gas Pipe Line Co., 760 F.2d 618, 621 (5th Cir. 1985)).

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court could not possibly evaluate whether PCI was likely to prevail on the merits. In addition, PCI fails to show that it would suffer irreparable injury if an injunction were not granted. PCI's doom-and-gloom prediction that without an injunction it would lose the use of the track and be forced out of business is not borne out by the record and the briefs. The only consequence of contract cancellation appears to be a reversion to the terms and conditions provided by the federal tariff that governs such operations. Any damage resulting from a shorter period before demurrage is charged can be compensated for monetarily.[42] We hold that there was no abuse of discretion by the district court in denying the injunction sought by PCI.

D. Failure to Conduct a Hearing

PCI makes the additional argument that the district court erred in failing to conduct a hearing before denying its motion for a preliminary injunction. Federal Rule of Civil Procedure 65(a)(1) specifies that "[n]o preliminary injunction shall be issued without notice to the adverse party." "We have interpreted the notice requirement of Rule 65(a)(1) to mean that 'where factual disputes are presented, the parties must be given a fair opportunity and a

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[42] See Morgan v. Fletcher, 518 F.2d 236, 240 (5th Cir. 1975) (citations and quotations omitted) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weights heavily against a claim of irreparable harm.").

01 042

meaningful hearing to present their differing versions of those facts before a preliminary injunction may be granted.'"[43]

PCI relies on our decision in Commerce Park as support for its contention that, before a preliminary injunction motion can be denied, a hearing must be held. In Commerce Park, however, we merely assumed for the purpose of our analysis that Rule 65 required that a hearing be held prior to the denial of a motion for a preliminary injunction.[44] The plaintiff has the burden of introducing sufficient evidence to justify the grant of a preliminary injunction.[45] PCI's motion for a preliminary injunction was predicated on the breach of a contract that was never put before the district court. PCI also failed to adduce any probative evidence that it would suffer irreparable injury in the absence of an injunction; its only factual offering was the conclusional statement that the demurrage charges would be too costly for it to remain in business. PCI's failure to introduce the contract into evidence and its failure to establish the existence of a factual

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[43] Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 628 (5th Cir. 1996) (quoting Commerce Park at DFW Freeport v. Mardian Constr. Co., 729 F.2d 334, 342 (5th Cir. 1984)).

[44] Commerce Park, 729 F.2d at 341.

[45] Canal Authority of the State of Florida v. Callaway, 489 F.2d 567, 578-79 (5th Cir. 1974).

01 043

dispute on the question whether it would suffer irreparable injury made a hearing unnecessary.[46]

The district court's orders denying PCI's motion for remand and denying PCI's motion for a preliminary injunction — including its refusal to conduct a hearing — are, in all respects, AFFIRMED.

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[46] Kaepa, Inc., 76 F.3d at 628 ("If no factual dispute is involved . . . no oral hearing is required.").

01 044

FORT WORTH & WESTERN RAILROAD

A Tarantula Corporation Company

CERTIFIED MAIL #7001 1940 0000 7584 7689
Return Receipt Requested

February 3, 2004

Mr. Randy Gaston
PCI Transportation Inc.
3201 N. Sylvania Ave.
Fort Worth, TX 76111

Dear Randy:

The invoice for July 2003 demurrage in the amount of $2,340.00 has not been paid. Charlie Godsey of our office has discussed this bill with you and has requested payment in full.

If payment in full is not received in our office by February 20, 2004, we will consider you in default of the Confidential Demurrage Contractual Agreement dated August 23, 2001 and demurrage provisions of FWWR Tariff 8001-F will be applied. Also, PCI will be placed on a cash basis and all cars destined to PCI will be held on constructive placement accruing demurrage until all outstanding invoices are paid.

To avoid FWWR taking these actions, please pay all outstanding invoices as outlined above.

Sincerely,

Jim M. Martin
President and COO

6300 Ridglea Place, Suite 1200, Fort Worth, TX 76116-5738
Phone 817-763-8297 Fax 817-738-9657

01 045

EXHIBIT "A"

FORT WORTH & WESTERN RAILROAD

A Tarantula Corporation Company

Via Email

March 2, 2004

Mr. Randy Gaston
PCI Transportation Inc.
3201 N. Sylvania Ave.
Fort Worth, TX 76111

Dear Randy:

Thank you for meeting with Steve George and myself yesterday concerning the payment of the July 2003 demurrage invoice in the amount of $2,340.00.

After further review it was determined that the outstanding demurrage due is $2,130.00 as indicated in the letter you received from Charlie Godsey. The cars you indicated that were runaround were done so on the instructions of PCI. The instructions were verbal, but our managers have confirmed the verbal instructions from PCI personnel. You are aware of the discussions that ensued about the verbal instructions from PCI after receiving this demurrage bill and it was subsequently decided that the oldest cars would be placed first unless we received written instructions from PCI. The demurrage charges in the amount of $2,130.00 are due and FWWR expects payment in full.

If payment in full is not received in our office by March 8, 2004, we will consider you in default of the Confidential Demurrage Contractual Agreement dated August 23, 2001 and demurrage provisions of FWWR Tariff 8001-F will be applied. Also, PCI will be placed on a cash basis and all cars destined to PCI will be held on constructive placement accruing demurrage until all outstanding invoices are paid.

To avoid FWWR taking these actions, please pay all outstanding invoices as outlined above.

Sincerely,

Jim M. Martin
President and COO

6300 Ridglea Place, Suite 1200, Fort Worth, TX 76116-5738
Phone 817-763-8297 Fax 817-738-9657

EXHIBIT "B"

01 046

-----Original Message-----
From: Randy Gaston [mailto:randy@thepcigroup.net]
Sent: Tuesday, March 02, 2004 4:32 PM
To: Steve George
Subject: RE: July 2003 Demurrage Bill

Steve,
I beg you to reconsider your stand on this.
The scenario of blaming it on Mario is in direct contradiction of what Jim Martin sa
He interrupted me when I said I had heard the reason the cars were gone around
request and Jim said, "that doesn't matter unless it was in writing and my people k
saying stating Mario denies asking for those cars to be gone around and even if it
is not) he wouldn't of done it for 11 days.
Please reconsider,
Randy

> -----Original Message-----
> **From:** Steve George [mailto:spg@fwwr.net]
> **Sent:** Tuesday, March 02, 2004 2:27 PM
> **To:** randy@thepcigroup.net
> **Subject:** July 2003 Demurrage Bill
>
> Randy,
>
> After our meeting yesterday, we have looked into the circumstances of the
> attached letter explains FWWR's position and payment in the amount of $
> 2004.
>
> Sincerely,
>
> Steve George

3/3/2004

EXHIBIT "C"

IN AND BEFORE THE
SURFACE TRANSPORTATION BOARD

PCI TRANSPORTATION, INC.,
Complainant,

v.

FORT WORTH & WESTERN RAILROAD COMPANY, INC.,
Respondent.

COMPLAINT NO. NOR42094

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the *Original Complaint and Application for Injunctive Relief* has been forwarded to counsel of record on this the 8th day of August, 2005, as indicated below:

Fort Worth & Western Railroad
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Matthew D. Germany